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Extending the Revisionist Project

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I am gratified by Stephen Siegel's generous analysis of my article and its place within the historiography of Gilded Age legal thought.[1] In his comment, Siegel has performed the invaluable task of synthesizing the various strands of revisionist scholarship in this area and examining the growing body of, in his apt words, "revisions of the revision." It should be noted that Siegel himself is at the forefront of the current wave of scholarship he describes. If Langdell is eventually ousted from his current position as the leading exemplar of late nineteenth-century private law jurisprudence, Siegel's seminal and sophisticated work, to which I am much indebted, will deserve much of the credit.

In current research I am closely comparing the common law vision of Carter and other anticodifiers to Langdellian classicism. Siegel's footnote regarding Carter's relationship to classical legal thought has thus triggered many thoughts in my mind.[2] In the paragraphs of my article to which he refers in this note, I implicitly challenge those scholars who have assumed that all Gilded Age jurists operated within a unified Langdellian paradigm. In doing so, I intimate that the true intellectual landscape was a bipolar one, in which legal thinkers either acknowledged the intimate connection between law and morals or embraced a soulless logical formalism. Siegel's comment reminds me of the importance of avoiding this simplistic dichotomy. In his most recent scholarship, Siegel has persuasively shown that many classicists outside Langdell's Harvard, and even some within, combined a concern for conceptual order and logical reasoning with a recognition of morality's role in legal decision making.

1. See Lewis Grossman, "James Carter Coolidge and Mugwump Justice," *Law and History Review* 20 (2002): 541–629, and Stephen A. Siegel, "The Revision Thickens," ibid., 631–37.

2. Siegel, "The Revision Thickens," 636, n. 23.

(The other Forum author, Manuel Cachán, has not offered a response, feeling none is required in his case.—Ed.)

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In light of Siegel's assertion that this fusion typified the jurisprudence of the era, I will, in my further work, carefully consider whether Carter's own value-laden historical jurisprudence included some of the formal elements of classical legal thought. Carter was, after all, a supporter of Langdell's deanship and teaching methods; perhaps he embraced aspects of his jurisprudence, as well.[3] Nonetheless, I think it likely that even on closer examination, I will conclude that Carter's vision of the common law, focused as it was on case-specific justice according to the standards of customary morality, left little room for the ideals of Langdellian legal science. Moreover, my preliminary research suggests that some other anti-codifiers, in painting a portrait of the common law that highlighted its advantages over a code, similarly relegated the goal of "determinate geometric order" to, at most, a subsidiary role.[4]

As Siegel's comment explains, the ongoing reassessment of Gilded Age private law jurisprudence has been accompanied by a much-needed reconsideration of the era's public law. There has, however, been much less activity on another important front mentioned by Siegel: the relationship between private and public law. The new revisionism raises interesting, but still largely unexplored, questions about this issue. Duncan Kennedy's assertion that private and public law were parallel facets of a highly integrated "rationalistic ordering of the whole legal universe" was based in part on the assumption that Gilded Age jurists viewed decision making in both realms as objective, apolitical, nondiscretionary deduction from abstract propositions.[5] As this premise is called into question, the nature of the interplay between private and public law in Gilded Age legal thought must be reexamined.

This is not to say that private and public law were not integrally related in the eyes of many jurists of the time. Carter, for instance, observed that "the boundary line of individual action marks out not only the limits beyond which other individuals must not pass, but also the limits which the state in its corporate capacity must not pass, and so in determining the true function of law we also determine the true province of legislation."[6] Cart-

3. For Carter's support of Langdell, see William P. LaPiana, *Logic and Experience* (New York: Oxford University Press, 1994), 12–13; *Harvard Law School Association, Report of the Organization and of the First General Meeting at Cambridge, November 5, 1886* (Boston, 1887), 25–28.

4. The phrase "determinate geometric order" is borrowed from Thomas C. Grey, "Langdell's Orthodoxy," *University of Pittsburgh Law Review* 45 (1983): 32.

5. Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940," *Research in Law and Sociology* 3 (1980): 20– 21.

6. James Coolidge Carter, *Law: Its Origin, Growth, and Function* (New York: G.P. Putnam's Sons, 1907), 135.

er did not, however, think that the lines demarcating legal actors' spheres of authority were static, sharply delineated, and logically determined, as Kennedy's scheme would lead one to expect. Rather, in Carter's eyes, these lines continually changed along with the evolving customary norms on which they were based.

Recent scholarship shows that other leading Gilded Age jurists also believed that private and public law had a common basis in the moral principles immanent in societal development.[7] This new understanding raises a need for studies that reconsider the dynamics of the relationship between private and public law in the late nineteenth century, particularly the connection between "historist" views of the common law and laissez-faire constitutionalism. Siegel himself has hypothesized that activist judicial review was embraced by those jurists who, unlike Langdell, found moral significance in the common law principles from which constitutional doctrines derived.[8] The example of Carter, however, suggests that at least some jurists assumed a relatively deferential stance toward social and economic legislation even while ascribing a moral basis to the common law.

Finally, I concur with Siegel's concluding discussion of the value of "thick description" in this area. Scholars who have set forth neatly periodized schemes have greatly advanced our understanding of the development of American legal thought. Nonetheless, such generalizations can lull historians into overlooking the details of the different, often competing, strands of thought within each era. The measure of the success of the current crop of revisionists should not be whether they establish a new overarching paradigm for understanding all Gilded Age jurisprudence, but whether they inspire others to explore the rich variety of intellectual currents that characterized the legal thought of the late nineteenth century.

7. See Stephen A. Siegel, "Historism in Late Nineteenth- Century Constitutional Thought," *Wisconsin Law Review* (1990): 1431–1547. The jurists Siegel discusses in this article are John Norton Pomeroy, Thomas Cooley, and Christopher Tiedemann. Siegel also identifies John Chipman Gray as a "historist." Stephen A. Siegel, "John Chipman Gray and the Moral Basis of Classical Legal Thought," *Iowa Law Review* 86 (2001): 1589–90.

8. Stephen A. Siegel, "Joel Bishop's Orthodoxy," *Law and History Review* 13 (1995): 254–55.